



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Frank DePalma II,
Sheriff's Officer Lieutenant
(PC2604V), Union County

Examination Appeal

CSC Docket No. 2019-635

ISSUED: OCTOBER 31, 2018 (ABR)

Frank DePalma II appeals the multiple choice portion of the promotional examination for Sheriff's Officer Lieutenant (PC2604V), Union County.

The subject examination was administered on July 26, 2018 and consisted of 45 multiple choice questions and one essay question.

The appellant's appeal involves Questions 29, 35, 40, 44 and 46 on the subject examination.

Question 29 involves a spam attack at New Jersey-based internet flower retailer (NJ Retailer). An investigation reveals that a Vermont resident was responsible for the attack. Specifically, the perpetrator caused a series of attacks against the website of a Nevada distributor that supplied the NJ Retailer. As a result, the NJ Retailer lost \$85,000 in sales during the month of February. The question asks how the examinee should advise the investigating detective in the examinee's agency to proceed based on the offense of computer criminal activity under the New Jersey Code of Criminal Justice. The keyed response is option d, that the offense of computer criminal activity can be charged and prosecuted in New Jersey, provided that the New Jersey resident and the New Jersey corporation suffered harm in New Jersey. The appellant argues that the question should be stricken from the exam because it unfairly tests specialized knowledge that would only be possessed by an attorney, a legal scholar or an individual with experience in a cyber crimes unit.

Question 35 indicates that while Officer Littleton was on patrol outside of a courthouse, a dispatcher notified her that an anonymous caller reported that a man with a handgun was near the exit to the juror's parking lot and the caller provided specific details about his appearance. Officer Littleton proceeded to that location, where three men were situated, including Sam Wesson, who matched the caller's description. Officer Littleton recognized Wesson from prior drug investigations and a drug-related arrest. She also knew that Wesson was associated with a street gang from the area. Officer Littleton had never known Wesson to carry a weapon, but she was aware of that gang's recent link to incidents involving handguns and shootings. Wesson and the two other men began to walk away as Officer Littleton's vehicle approached them. Wesson appeared nervous and moved his hand towards his waistband as he turned away. Based on her training and experience, Officer Littleton believed that Wesson might be hiding a gun. She exited her vehicle, approached Wesson and had him place his hands against a nearby fence. Wesson cooperated and complied with her instructions. Officer Littleton then lifted Wesson's t-shirt and observed the top of a plastic bag protruding roughly two inches from his waistband. She removed the bag and immediately recognized that it contained crack cocaine. Officer Littleton then arrested Wesson and transported him to central processing. The question asks for the correct statement regarding the arrest, search and seizure of Wesson under current New Jersey case law. The keyed response is option c, "Officer Littleton had the required justification to conduct both a stop and a frisk of Wesson, but her act of lifting Wesson's t-shirt to see his waistband was improper, making the arrest unlawful." The appellant argues that the "elaborate, intricate minutiae of said scenario, in the totality of the circumstances" rendered the officer's action appropriate. Moreover, he contends that the question was unfair because it depicted a "very intricate, elaborate, complex, convoluted scenario."

Question 40 asks, pursuant to Attorney General Directive No. 2018-3, which pertains to Statewide Mandatory Early Warning (EW) Systems, what action among the four choices listed should not be taken when an EW system preview process is initiated. The keyed response is option c, "[c]ontinue to monitor the subject officer for up to one month." The appellant argues that the question should be removed from the subject examination because it is unfair "as a matter of general principle and fairness, given the intricate, elaborate complex minutiae regarding State Attorney General Guidelines."

Question 44 indicates that Nicki Brown approached a screen and inspection station at the county courthouse, where a sign informs visitors that security screening is conducted at all times. Specifically, the security screening requires individuals to pass through a metal detector and submit their packages for inspection. As a Sheriff's Officer inspected Brown's pocketbook, Brown told the officer not to open a three-and-one-half inch by four-and-one-half inch metal container bearing the label of "Halls" sore throat relief. The Sheriff's Officer

ignored the request, opened the container and found vials of cocaine. The question asks how the evidence would be treated based upon current case law. The keyed response is option c, which states that it would be deemed “admissible because a search of such intensity is properly part of the usual inspection process at a courthouse. The appellant argues that option a, it would be held “admissible because the search is considered an implied consent search, which cannot be refused at a courthouse,” is the best answer. Additionally, he contends that because he is “not an attorney [or] a legal scholar,” the question was unfair.

CONCLUSION

In the instant matter, the appellant asserts that Question 29 should be removed from the examination because it requires highly specialized knowledge that does not fairly assess each candidate’s merit and fitness for the subject title. Upon review, the question tests candidates on their knowledge of *N.J.S.A. 2C:1-3*, the territorial applicability statute containing the jurisdictional requirements for a person to be convicted of an offense under the New Jersey Code of Criminal Justice. It is imperative that a law enforcement officer, particularly one of a supervisory rank, know that if an individual causes harm in this State, even if the conduct occurs out-of-state, pursuant to *N.J.S.A. 2C:1-3a* and *N.J.S.A. 2C:1-3g*, that individual can be charged with a crime under the New Jersey Code of Criminal Justice. In this case, failing to understand this basic jurisdictional concept could cause a number of problems. For instance, if law enforcement officers investigate matters where they clearly lack jurisdiction, they end up wasting time, manpower and other resources. Conversely, if law enforcement officers do not investigate a matter because they fail to recognize that it falls under their jurisdiction, it will cause a miscarriage of justice because that failure will allow a guilty party to evade charges for crimes covered under the New Jersey Code of Criminal Justice. Accordingly, the Commission finds that Question 29 is valid and correct as keyed.

With regard to Question 35, the scenario that the appellant characterizes as one containing “elaborate, intricate minutiae” is designed to test examinees’ ability to protect and serve the public within a constitutional framework. Here, the parameters of a constitutionally permissible search are governed by the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, both of which protect citizens against unreasonable searches and seizures, and associated case law. The nuances of a given search and seizure are not “elaborate, intricate minutiae.” Rather, they are fundamental points which determine whether a search and seizure is constitutionally permissible. It is imperative that a law enforcement officer know the proper manner for conducting a search and seizure, as under the exclusionary rule, unconstitutionally-seized evidence may not be used in a court of law. In other words, it can cause “the criminal [] to go free because the constable has blundered.” *People v. Defore*, 142 N.Y. 13, 21, 150 N.E. 585, 585-589 (N.Y. 1926). Moreover, unconstitutional

searches, seizures and arrests may undermine public confidence in law enforcement. There is a greater need for a supervisory law enforcement officer to understand the nuances of what constitutes a constitutionally-permissible search because they oversee subordinate officers. As to the merits of the question, the fact pattern in this question mirrors that of *State v. Privott (Privott)*, 203 N.J. 16 (2010). Specifically, it involves an officer receiving word of an anonymous tip describing a gun-toting individual, that officer stopping and frisking a suspect who matched that description and conducting an arrest after that search revealed that the suspect possessed crack cocaine. The officer discovered the crack cocaine after she lifted the suspect's t-shirt and found the top of a plastic bag containing that substance protruding from his waistband. The *Privott* decision held that the stop and frisk under analogous circumstances was permissible, but that the maneuver of lifting the suspect's t-shirt exceeded the scope of a constitutionally-permissible limited search of a person to discover weapons. Thus, Question 35 is correct as keyed.

Concerning Question 40, the validity of a question is based on whether the area tested by the question is linked to the job. In this regard, as indicated in the Orientation Guide:

A job analysis was conducted to identify the knowledge, skills, and abilities that are necessary to perform the job of Sheriff's Officer Lieutenant. A job analysis is the process of critically examining job components in order to provide a functional description of a job. Based on this job analysis, a number of work components were identified, and it is from these work components that a distinct examination has been developed. During the job analysis, Sheriff's Officer Lieutenants ranked each work component in terms of its importance. Examination questions will relate to those work components that were determined to be most critical. A list of the most critical work components along with the relative test weight of each is as follows:

<u>Weight</u>	<u>Test Content</u>
15.00%	Supervision
15.00%	Interpersonal Relations
15.00%	NJ Title 2C
10.00%	AG Guidelines
10.00%	Search Procedures
10.00%	Arrest Procedures
10.00%	Critical Thinking
10.00%	Problem Solving
<u>5.00%</u>	Written Communication
100%	

(emphasis added)

Knowledge of this Attorney General Directive is an important part of the job of a Sheriff's Officer Lieutenant. As noted in the examples of work in the job specification for the title of Sheriff's Officer Lieutenant, an incumbent is "responsible for maintaining efficiency, discipline, and morale of personnel in organizational components" and has responsibility "for effectively recommending the hiring, firing, promoting, demoting, and/or disciplining of personnel." Further, as noted in Attorney General Directive No. 2018-3, EW Systems are an "important management tool designed to detect patterns and trends in police conduct before that conduct escalates" which help to enhance public safety and confidence in law enforcement and assist officers by offering early intervention. Therefore, the foregoing demonstrates that Question 40 is a proper part of the subject examination and is correct as keyed.

With Question 44, as noted above, the validity of a question is based on whether the area tested by the question is linked to the job. Here, the knowledge of courthouse and general search procedures are clearly linked to the duties of a Sheriff's Officer Lieutenant. Moreover, the orientation guide advised candidates that 10% of the examination would be based upon search procedures and that case law would be among the sources used to develop the examination. Thus Question 44 tests a valid subject. As to the best answer to Question 44, it is noted that the search of Brown at the courthouse screening and inspection station begins as an implied consent search. Specifically, by proceeding past past a sign that warned visitors that they would subject to security screening and submitting her pocketbook for a search, Brown implicitly consented to the search. However, while option a, references it as an implied consent search, option a is not the best answer, as the statement that "it cannot be refused at a courthouse" is not a wholly accurate statement. Under applicable case law, an individual can refuse a search at a courthouse and choose to leave the premises instead. *See McMorris v. Alioto*, 567 F.2d 897, 900-01 (9th Cir. 1978). As such, the better answer is that it is consistent with the usual inspection process at a courthouse. *See id.*; *see also U.S. v. Homburg*, 546 F.2d 1350, 1353-54 (9th Cir 1976); *State v. Plante*, 594 A.2d 165 (N.H. 1992). In this regard, the government's interest in preventing weapons from being brought into the courthouse facility would be considered a legitimate and compelling interest. A three-and-one-half inch by four-and-one-half inch container is large enough to potentially conceal a weapon. As such, the search of the container would be considered a necessary measure to determine whether Brown was carrying a weapon inside of it. Therefore, the best answer is that it is consistent with the usual inspection process at a courthouse and Question 44 is correct as keyed. Accordingly, the appellant's examination score is amply supported by the record and the appellant has failed to meet his burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 31ST DAY OF OCTOBER, 2018



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